



## **THE ISSUE**

Whether MTA properly removed Dentis Thomas from the position of Money Runner effective November 30, 2008.

## **FACTS**

### **Mr. Thomas' Work History**

Thomas has been employed by MTA since 1974. He was a bus operator until 1997 and a light rail operator from 1997 until he was terminated on August 16, 2000. His termination followed an accident that occurred on August 15, 2000. He was operating a light rail train en route to the light rail station at Baltimore Washington Airport. As the train approached the airport station, Thomas fell asleep and crashed the train into a bumper and ceiling inside the station. He was charged with gross misconduct and the next day was fired.

His union, Amalgamated Transit Union, Local 1300, ("Local" or "Union") filed a grievance claiming that he had been terminated without just cause. An arbitration of the grievance was conducted on August 15, 2001. The evidence produced in the arbitration hearing revealed that following Thomas' discharge two physicians diagnosed him as suffering from sleep apnea.<sup>1</sup> MTA's doctor evaluated Thomas and on March 21, 2001 issued a report questioning the causal relationship between the sleep apnea and the accident. He recommended that Thomas undergo further sleep study and that "he have at least a 12-month period of time prior to resuming safety-sensitive duties where he is free of any and all symptoms of drowsiness and sleepiness (sic) while carrying out his activities of daily living." The evidence also disclosed that since the accident occurred Thomas had

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<sup>1</sup>Sleep Apnea is a condition that causes an individual to stop breathing for 10-30 seconds at a time while sleeping. As a result, the individual never completes a full sleep cycle and has significant daytime sleeplessness.

been successfully treated with nasal CPAP therapy<sup>2</sup>, that since being place on the CPAP he has had no episodes of falling asleep.

According to the Arbitration Award, Thomas testified that if reinstated he did not wish to be placed in a “safety-sensitive” position. The Union agreed and asked the Arbitrator to return him not to his prior position but, as a station attendant “in recognition of his years of service with this Employer.” The Arbitrator found that the discharge violated Thomas’ rights under the parties’ CBA and ordered that Thomas “be reinstated to a full-time station attendant job . . . ,” with the proviso that Thomas “be prohibited from attempting to bid into any position that involves operation of vehicles, machinery or equipment that could pose a danger to himself or others.” (Jt. Exhibit 5) The Award also stated that his decision “shall not have any precedential value regarding any future cases between these parties due to its unique factual circumstances.” (Jt. Exhibit No. 5)

In compliance with the Arbitrator’s Award, Thomas was reinstated as a station attendant. He served in that position until April 2008. On April 11, 2008, MTA posted a “**NOTICE OF VACANCY**” for the position of Money Runner. The qualifications for the vacancy included ability to operate a fork lift and pass clearance to obtain a hand gun. According to the testimony, the money runners operate in two or three man crews and go from station to station. They remove and install vaults in the ticket vending machines, empty and replenish coin bins and, as set forth in the Notice, “Transports all revenue collected to counting locations.” The evidence disclosed that money runner crews use two vehicles - a step van and a passenger car - to perform their tasks. (Union Exhibit No. 1) Thomas bid on the vacancy and based on his seniority, was awarded the position of Money Runner and as the testimony revealed, he regularly drove one of the vehicles. It was also shown that he had applied for a hand gun permit.

#### **Mr. Thomas’s Removal as a Money Runner**

On September 8, 2008, Thomas filed two grievances neither of which bore any connection to the subject of this Arbitration. However, in management’s response to the Union President denying these grievances, dated October 29, 2008, Denise Gregory Wyatt, MTA’s Director of

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<sup>2</sup>CPAP is a continuous positive airway pressure machine. It is a mask that is worn at night to force air into an individual’s airway. The CPAP keeps a person’s airway open while sleeping so the person can reach a deep sleep. According to the American Psychiatric Association, this machine is a common treatment for sleep apnea.

Labor and Employment Relations, stated that “Upon receiving these grievances it has also come to my attention that an August 29, 2001 arbitration decision awarding Mr. Dentis Thomas reinstatement to a full-time station attendant position also clearly stated that Mr. Thomas is ‘ . . . prohibited from attempting to bid into any position that involves operation of vehicles, machinery or equipment that could pose a danger to himself or others.’”

Her letter described it as “unfortunate” that when Mr. Thomas bid on the Money Runner position “those processing the bid were unaware of the arbitration award.” Ms. Wyatt’s letter continued that the money runner position “involves operation of the money truck as well as handling equipment (a licensed gun) that can pose a danger to himself or others,” and for “these reasons, Mr. Thomas is being removed from his position as Money Runner and will be placed back into the position of Station Attendant effective November 3, 2008.”

The grievance in this case followed.

Ms. Wyatt was not called as a witness by either party. Thus, there is no evidence in the record to explain how the 2001 arbitration award came to her attention. Nor, was there evidence to show that either she or anyone from management spoke to Mr. Thomas after the Arbitration Award came to her attention or conducted an investigation to determine the current status of the medical condition described by the Arbitrator as of 2000 or to inquire of Thomas’s colleagues and supervisors how Thomas was performing in the money runner position. Rather, as the record in this case disclosed, Ms. Wyatt read the 2000 Arbitration Award and summarily removed him from the position which he had bid for and was awarded in accordance with his CBA.

### **Discussion**

The MTA argues that Thomas’ grievance raises an issue of contract interpretation, presumably the meaning of the 2001 Arbitration Award. The Union contends that the 2001 Arbitration Award is “history” and since things change in eight years should no longer be enforced. I respectfully question both of these arguments.

According to the 2001 Arbitrator, Thomas and the Union each sought his reinstatement. However, both asked for reinstatement to a position that was not “safety sensitive.” The Union actually said reinstatement to a station attendant position, and that is what the Arbitrator ordered.

The Award did not use the term “safety sensitive.” Rather the Arbitrator imposed the condition on Thomas that once he was reinstated he would “be prohibited from attempting to bid into any position that involves operation of vehicles, machinery or equipment that could pose a danger to himself or others.” (Jt. Exhibit 5)

It is fair to say, as MTA Counsel suggests, this proviso is subject to interpretation. However, the Award itself is silent on its application. Indeed, the words “vehicles, machinery or equipment” do not appear anywhere in the Arbitrator’s discussion of the case, only in the Award section. The absence of explicit guidance from the Arbitrator on the application of the proviso, however, does not rule out the possibility of parsing the Arbitrator’s intent. Indeed, the context of the 2001 arbitration provides a powerful indicator of the Arbitrator’s intent. Thomas had been a train and bus operator for many years - clearly “safety sensitive” positions. He caused a serious accident and thus it is fair to say that the Arbitrator’s focus was on the risks of operating a train or bus with their loads of passengers. He was clearly not going to put him back in that position and when he banned him from “attempting to bid” on any position that involves operation of vehicles, machinery or equipment that could pose a danger to himself or others,” a reasonable assumption might be that he was referring to Thomas’ former positions as a train and bus operator.

However, I find that my decision can be made without making this assumption because I do see the case as requiring contract interpretation. But unlike MTA Counsel, I believe that the contract to be interpreted is the CBA. Indeed, the underpinning of any collective bargaining agreement, its essence, rests on the concept of “good faith and fair dealing.” The principle of reason and the spirit of equity is an inherent part of every CBA and is uniformly applied by arbitrators. *How Arbitration Works*, Elkouri and Elkouri Sixth Edition Ch. 9.3.B.iii. Here, when MTA’s Director of Labor Relations summarily removed Thomas from his money runner position, the Agency violated this fundamental cannon of the common law of the shop. Thus, the record shows, apparently acting on her own without any investigation, she removed Thomas from a position that he had been awarded through the CBA’s bidding process. Upon uncovering the 2001 Award, the appropriate and fair way of reacting to this eight-year old bit of information would have been for Ms. Wyatt to conduct an investigation to determine whether, with the passage of the eight years since the Award, Thomas may be fit to hold the money runner position in 2008, with or without corrective measures. That determination may have required Thomas to undergo further medical examination and to provide

updated medical certification in order to determine his fitness to continue in the position.

While the ADA Restoration Act of 2008, signed by President Bush in September 2008, was enacted to clarify whether a person whose physical impairment is corrected is disabled under the ADA, it is worth noting what the Supreme Court said in *Sutton v. United Airlines, Inc.*, 527 U.S. 471 (1999) about corrective measures to overcome health issues: “. . . it is apparent that if a person is taking measures to correct for, or mitigate, a physical or mental impairment, the effects of those measures—both positive and negative—must be taken into account when judging whether that person is “substantially limited” in a major life activity and thus “disabled under the Act” . . . A person whose physical or mental impairment is corrected by medication or other measure does not have an impairment that presently “substantially limits” a major life activity. To be sure, a person whose physical or mental impairment is corrected by mitigating measures still has an impairment, but if the impairment is corrected it does not “substantially limi[t]” a major life activity.”<sup>3</sup>

While the Court was speaking of the ADA test for determining disability, the reasoning applies equally here where the issue could be whether Thomas’ physical impairment when corrected by the mitigating measure of a CPAP limits his ability to function as a Money Runner. MTA made no effort to give Thomas the benefit of this basic exercise of fairness.

Finally, there is the 2001 Arbitration Award’s dictate that the decision “shall not have any precedential value regarding any future cases between these parties due to its unique factual circumstances.” Neither party commented on this part of the Award and what the Arbitrator meant but in view of my decision that follows I will pass on undertaking a determination of how, if in any way, this proviso to the Award might rule out the 2001 Award as any basis for MTA removal of Thomas from the Money Runner job, a job which he had secured through the bidding processes of the CBA.

### **Award**

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<sup>3</sup> In *Sutton* and two companion cases, *Albertson’s, Inc. v. Kirkingburg*, 527 U.S. 555 (1999); and *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516 (1999) the United States Supreme Court held that the determination of whether an individual is disabled under the Americans with Disabilities Act should take into account measures that can correct the impairment.

Based on the above violation of Thomas' rights under his CBA, he is to be returned to the position of Money Runner; however, with the proviso that before he is returned to the Money Runner position and within five calendar days of this Award, MTA may require him to provide medical certification from an independent physician, at the MTA's expenses, of his fitness to perform the duties required in the position of Money Runner, with or without corrective measures.

I shall retain jurisdiction of this matter pending compliance with this Award.

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Edward J. Gutman, Arbitrator

Dated: March 27, 2009

Thomas MTA award 2009 (B0880184).WPD